STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs

PATRICK LEWIS,

Defendant-Appellant.

_____/

Supreme Court
No. _____

Court of Appeals
No. 244589

Kent County Circuit
Court No. 01-02471 FC

127261

ANSWER IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

William A. Forsyth (P 23770)
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Now comes the Plaintiff, the People of the State of Michigan, by Assistant Prosecuting Attorney Gary A. Moore, and in opposition to Defendant's Application for Leave to Appeal hereby incorporates the arguments set forth in Plaintiff's Brief on Appeal filed in the Court of Appeals, a copy of which is attached hereto.

For the reasons set forth in the attached brief, Plaintiff respectfully requests that this Court DENY Defendant's Application for Leave to Appeal.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Timothy K. McMorrow (P 25386)
Chief Appellate Attorney

Dated: October 27, 2004

By: _____
Gary A. Moore (P34590)
Assistant Prosecuting Attorney

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

STATEMENT OF APPELLATE JURISDICTION

The People accept Defendant-Appellant's Statement of Appellate Jurisdiction, and accept that this matter is before the Court as an appeal of right.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

IS DEFENDANT ENTITLED TO A NEW TRIAL ON GROUNDS THAT HE WAS DENIED A JURY CHOSEN FROM A FAIR CROSS-SECTION OF THE POPULATION, WHEN NO OBJECTION WAS RAISED TO THE COMPOSITION OF THE VENIRE AT THE TIME THE JURY WAS SELECTED?

The trial court did not address this issue.

Defendant answers "yes."

The People answer "no."

II.

WAS DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, WHEN COUNSEL ADEQUATELY INVESTIGATED THE CASE BY GOING FULLY THROUGH THE PROSECUTION AND POLICE FILES, AND THERE IS SCANT EVIDENCE, OTHER THAN DEFENDANT'S OWN CLAIMS, OF WHAT ANY OTHER WITNESSES COULD HAVE ADDED, WHEN THE FAIR CROSS-SECTION ISSUE WAS NOT KNOWN TO EXIST UNTIL AFTER TRIAL HAD BEEN COMPLETED, AND WHEN DEFENDANT'S STATEMENT ABOUT COMMUNICATION WITH COUNSEL CONFLICTS WITH DEFENSE COUNSEL'S?

The trial court answered "no."

Defendant answers "yes."

The People answer "no."

III.

IS DEFENDANT ENTITLED TO REVERSAL ON THE GROUNDS THAT A TAPE PLAYED FOR THE JURY WAS UNINTELLIGIBLE AND A TRANSCRIPT SHOULD NOT HAVE BEEN GIVEN TO THE JURY, WHEN THE COURT CLEARLY FOUND THAT THE TAPE WAS INTELLIGIBLE ENOUGH FOR THE JURY TO DETERMINE ITS CONTENTS, AND ANY ERROR IN PROVIDING THE TRANSCRIPT TO THE JURY WAS HARMLESS, GIVEN THE WEIGHT OF THE EVIDENCE IN THIS CASE?

The trial court would answer "no."

Defendant answers "yes."

The People answer "no."

COUNTER-STATEMENT OF FACTS

The People believe that defendant's statement of facts does not strictly comply with the requirements of MCR 7.212(C)(6). However, the facts adduced at trial will be addressed in the issues raised by defendant.

ARGUMENT

I.

DEFENDANT HAS FAILED TO PRESERVE HIS CLAIM THAT HE WAS DENIED HIS RIGHT TO A JURY DRAWN FROM A VENIRE REPRESENTATIVE OF A FAIR CROSS-SECTION OF THE COMMUNITY. THE RECORD DOES NOT AFFIRMATIVELY SUPPORT DEFENDANT'S CLAIM. ACCORDINGLY, HE IS NOT ENTITLED TO RELIEF.

Preservation of error: Defendant did not object to the composition of the venire. He has failed to preserve his claim of error. *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003); *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

Standard of Review: This Court is precluded from reviewing unpreserved claims of error except in cases of plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Argument: Defendant's claim, that he was denied his right to a jury drawn from a venire representative of a fair cross-section of the community, was not preserved by objection. The record does not affirmatively show that he was denied such a right. Accordingly, his argument must be rejected.

As noted above, defendant never objected to the composition of the venire. A challenge to the jury array, made for the first time after a guilty verdict, is not timely. *People v McCrea*, 303 Mich 213, 278; 6 NW2d 489 (1942). A claim of systematic underrepresentation in the jury venire is forfeited if it is not raised before the jury is impaneled and sworn. *McKinney, supra,* 258 Mich App 161-162**Error! Bookmark not defined.**; *Dixon, supra*, 217 Mich App 404. The present case is in precisely the same posture as *McKinney, supra*, another Kent County case involving the same computer problem. Defendant's failure to object is fatal to his claim.

Defendant argues that he is excused from the issue preservation requirement, citing *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988). *Amadeo* addressed the issue of when, in a federal habeas corpus case, the "cause and prejudice" test is met, thus allowing a petitioner to raise an issue that was not raised in the first instance in the trial court. The Court found that the failure to raise a constitutional issue unknown to him at the time of trial satisfies the "cause" requirement. *Id.* at 222. As noted above, *Amadeo* states a rule applicable to raising a claim on collateral attack, in a habeas proceeding. Importantly, the first portion of the "cause and prejudice" test asks whether some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986). In *Amadeo*, the first prong was satisfied by the collusive "interference by officials." *Amadeo, supra*, 486 US 222. In fact, the Supreme Court simply found that the district court's findings were not clearly erroneous.

The facts in *Amadeo* contrast sharply with those of the present case. In *Amadeo*, the district attorney and jury commissioners of Putnam County, Georgia, engaged in a scheme to intentionally conceal the underrepresentation of black men and women on jury panels. *Id.* at 217-218.; see also *Amadeo v Kemp*, 773 F2d 1141, 1143 (CA 11, 1985). It is clear why such conduct, which was designed to intentionally conceal the underrepresentation, would allow a petitioner to say that he was not aware of the constitutional issue. In Kent County, on the other hand, there has been no allegation of intentional concealment of any such underrepresentation.

Most importantly, in the present case, review is precluded by the lack of any evidence in the record, other than defendant's self-serving statements, showing that the venire from which defendant's jury was picked was not comprised of a fair cross-section of the community. Clearly, even if an error in a computer system existed, it would still be possible for a jury to be

selected from a fair cross-section of the community. Defendant has no constitutional right to a computer program, designed to summon people to jury duty, that is free of bugs; he has a right to a venire comprised of a fair cross-section of the community. Given that there is no credible evidence that the venire was not so comprised, defendant's claim must fail.

II.

DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL ADEQUATELY PREPARED FOR TRIAL, APPROPRIATELY CROSS-EXAMINED WITNESSES, AND OTHERWISE REPRESENTED DEFENDANT EFFECTIVELY.

Preservation of Error: Defendant obtained an evidentiary hearing in the trial court on his claim of ineffective assistance of counsel. His claim may be based on the record developed therein, as well as from the rest of the record on appeal.

Standard of Review: A defendant is deprived of effective assistance of counsel if (1) the performance of counsel fell below an objective standard of reasonableness, and (2) the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Argument: Defendant's claim, that he was denied the effective assistance of trial counsel, is without merit.

Defendant filed a motion for new trial in which he claimed that he was denied the effective assistance of counsel. A hearing was held on his motion on September 26, 2003. Tonya Krause-Phelan, the attorney who represented defendant at trial, testified that she first met with defendant at some time in early 2001 (M Tr, 5).[1] At this time, Ms. Krause-Phelan did not

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[1] The People will use the following format in citing to the record:

Tr I: March 28, 2002 Jury Trial
Tr II: April 1, 2002 Jury Trial
Tr III: April 2, 2002 Jury Trial
Tr IV: April 3, 2002 Jury Trial
Tr V: April 4, 2002 Jury Trial

represent defendant, but was meeting with defendant at the request of his family, with an eye toward possibly representing him (M Tr, 5). Krause-Phelan was appointed on September 20, 2001, and visited defendant for the first time after the appointment on September 23, 2001 (M Tr, 7). Sometime after her appointment, Krause-Phelan was on medical leave, followed by maternity leave; during this period, her husband[2] covered a hearing, and a law clerk may have visited defendant (M Tr, 7-8). However, no one actually took over the file during this period (M Tr, 8). Krause-Phelan admitted to being off work for three weeks in October 2001 and from the end of November 2001 until the first week of February 2002 (M Tr, 25-26). When she went on leave, she asked defendant if he wanted her to withdraw as counsel from his case; he told her he did not want her to withdraw (M Tr, 29).

Once Krause-Phelan returned to work, she visited with defendant (M Tr, 9). Although she did not recall specifics of the visit, she recalled that defendant gave her names of witnesses (M Tr, 9-10). She had no reason to dispute any claims that defendant gave her names of four people he believed would serve as impeachment witnesses "on the issue of the jailhouse snitch" (M Tr, 10-11). Krause-Phelan did not believe that she spoke to any of these potential witnesses, although her law clerk tried to locate some of them (M Tr, 11). In addition, she was given other names of witnesses who either witnessed the shooting or events occuring immediately after the shooting; she did not interview these people prior to trial, noting that several of them were listed as prosecution witnesses (M Tr, 12, 13). One of the witnesses,

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Tr VI: April 5, 2002 Jury Trial
S Tr: August 21, 2002 Sentencing Hearing
M Tr: June 27, 2003 Hearing
M Tr II: September 26, 2003 Hearing
[2] Lawrence Phelan is also a criminal defense attorney in Grand Rapids.

Dwight Mapp, gave testimony that was damaging to the defense (M Tr, 14). Police reports indicated that Mapp had asked for a lineup so that he could make sure of his identification (M Tr, 14). The records did not disclose whether a lineup actually was conducted (M Tr, 14-15). Another witness, Angela Cross, was held in the Kent County Jail as a material witness (M Tr, 34). She had written a letter to defendant; Krause-Phelan did not use this letter to attempt to impeach her (M Tr, 35).

Krause-Phelan obtained an order from the court authorizing funds for an investigator (M Tr, 16). However, the investigator was never used (M Tr, 17). Krause-Phelan admitted that she had interviewed witnesses in previous investigations of cases (M Tr, 17). In this case, she had extensive conversations with both "Mr. Plant" and Lawrence Phelan about the witnesses at the preliminary examination (M Tr, 18).

Krause-Phelan admitted to agreeing to excuse Mary Hughes, a witness defendant had wanted at trial who may have given a description of the clothes worn by the murderer that differed from the clothes defendant wore that day (M Tr, 20). Krause-Phelan said that if she had believed the witness could be helpful, she would not have agreed to excuse the witness (M Tr, 21). In addition, she generally would discuss such a decision with her client, although she could not specifically remember whether she did so in this case (M Tr, 21).

Krause-Phelan admitted that during part of the trial, a law clerk sat between her and defendant (M Tr, 22). She did so because defendant became angry with her, and "transfer[3] came to me and said they were concerned for my safety" (M Tr, 22-23). The move took place

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[3] This is apparently a reference to the deputies that assist in transferring prisoners from the Kent County Jail to court.

"probably in the middle" of trial (M Tr, 23). If she needed to consult with defendant, she would either lean over the law clerk or walk around the table to where defendant was seated (M Tr, 24).

Krause-Phelan estimated that she had at least 50 open files in state and federal court during the time she was on leave (M Tr, 27). She also had approximately 15 misdemeanor files (M Tr, 28).

Krause-Phelan said that she did not believe it would have been a better practice to withdraw from the case when she went on leave (M Tr, 29). The court had been generous in granting adjournments, defendant had agreed to the adjournments, and he wanted her to stay on the case (M Tr, 29-30). When she returned to work, she met with the prosecutor and detective assigned to the case to ensure that she had received all the discovery material, listened to tape recordings made of defendant, and prepared the case for trial (M Tr, 30). While she had no reason to suspect that the prosecution team had not turned discovery material over, she wanted to make sure that she had gone over the files again before going to trial (M Tr, 31). She may not have visited defendant until March 20, 2002, approximately one week before trial (M Tr, 36). She could not recall if trial strategy was discussed at this meeting (M Tr, 37).

Counsel then questioned Krause-Phelan on her preparation for trial. She testified that she had determined the names of each witness and what the content of their testimony would be (M Tr, 40). She had notes on each witness, with her thoughts and strategy on cross-examination of those witnesses (M Tr, 41). She then counted 19 police officers, 8 witnesses involved in the K-9 track, two witnesses from St. Mary's Hospital, three Grand Rapids Fire

Department personnel, two AMR personnel, and 17 lay witnesses (M Tr, 41). She had notes on all of them (M Tr, 42).

Krause-Phelan met with defendant on March 20, 2002 (M Tr, 43). The purpose of this meeting was primarily to discuss the plea bargain offer made by the prosecutor, Jay Stone (M Tr, 43). Trial began one week later, on March 27 (M Tr, 43). When counsel said that she first talked about trial strategy with defendant on March 23, Krause-Phelan corrected him and said that she had first talked trial strategy at their first meeting, six months earlier (M Tr, 43). She discussed the main identification witnesses and how she planned to attack their testimony at trial (M Tr, 45). She probably discussed with defendant the witnesses that he had asked to have subpoenaed that were not on the prosecutor's list of witnesses (M Tr, 45). She did not believe she subpoenaed any witnesses in this trial (M Tr, 46). Further, she did not file any pretrial motions (M Tr, 46).

Krause-Phelan admitted that defendant told her on at least one occasion that he objected to the composition of the jury (M Tr, 46). She made no objection on the basis that he was being denied a jury drawn from a fair cross-section of the population (M Tr, 46). She raised the issue with Judge Buth prior to sentencing (M Tr, 47).

A *Grand Rapids Press* article, whose date was not disclosed during the hearing, suggested that there were two other suspects in this case (M Tr, 48). Krause-Phelan did not investigate these suspects, saying, "I don't know if there was any information for me to follow up on" (M Tr, 48-49). She had looked through the prosecutor's and detective's files, at least in part, to see if there was any information on these "suspects" (M Tr, 49).

She did not recall precisely when she discussed with defendant that she would not call any witnesses other than him; she said that it was most likely that this occurred after the prosecution rested (M Tr, 51).

On cross-examination, Krause-Phelan testified that she did not use the investigator because the lay witnesses had already given conflicting statements, which she found in the discovery material, and she could not see what having another statement might do (M Tr, 54). Her strategy was to impeach these prosecution witnesses with their inconsistent statements (M Tr, 54). In addition, the detective in the case wound up performing the services that the investigator would have performed (M Tr, 54). She gave one example in which the detective took her to the crime scene, allowed her in the house, and took photographs that she requested (M Tr, 54).

With respect to witnesses who would testify about the jailhouse snitch, Jesse Solis, she tried to find these witnesses but ran out of time before trial (M Tr, 55). Also, the detective admitted to Krause-Phelan that the information Solis gave could have come from the discovery material and/or police reports (M Tr, 55). This was the crux of Krause-Phelan's argument, that Solis was making up his story, and he was able to do so because he had been able to look at defendant's paperwork (M Tr, 55). She felt the detective would have a lot more credibility than other jailhouse individuals (M Tr, 55).[4]

As for other witnesses, some were given to her as alibi witnesses (M Tr, 56). It was clear that this case would not involve an alibi defense (M Tr, 56). In fact, defendant would

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[4] On redirect, counsel questioned whether Krause-Phelan had gotten this admission from the detective (M Tr, 61). On recross, she clarified that she obtained the admission from the Solis himself (M Tr, 65).

testify that he was in the vicinity, so following up on these witnesses would not be of assistance (M Tr, 56). Further, other witnesses, such as the firefighters, did not require being interviewed; it was not at issue that a person died from a gunshot wound (M Tr, 56).

Krause-Phelan testified that she had felt very prepared for trial (M Tr, 57). She did not file any pretrial motions because she did not recall any issues that needed to be raised (M Tr, 57-58). The problem with the computer program came up after conviction, but before sentencing (M Tr, 58). With respect to the *Grand Rapids Press* article alluding to two other suspects, she had examined the police files and concluded that police were eliminating suspects that were in the adjoining portions of the duplex in which the offense occurred (M Tr, 58-59). However, she saw nothing separate on any suspects (M Tr, 59). Finally, Krause-Phelan testified that she likes to interview the witnesses in many of her cases, but at times, given the content and context of the police reports, she may not interview a witness (M Tr, 59).

Defendant testified that the first time Krause-Phelan met with him, in March 2001, they met for about 35 minutes, with Krause-Phelan saying that she would get an investigator to track down witnesses (M Tr, 68). She was not hired at this point (M Tr, 68). They met again in September 2001; in this meeting, defendant gave her the names of witnesses, and wrote them down (M Tr, 69). He also sent names to Krause-Phelan by mail (M Tr, 69). He wrote to Krause-Phelan on a number of occasions, explaining that she had not visited him at all (M Tr, 70). He received a visit from Krause-Phelan's law clerk in late February or early March (M Tr, 70). Defendant gave the law clerk several names, presumably of witnesses (M Tr, 72).

Defendant denied being consulted about adjournments in the case (M Tr, 71). He said that the first time she came to see him was shortly before trial (M Tr, 71). Among the names were Greg Carter and Eddie Griffin, who had been in the cell with defendant and Jesse Solis (M Tr, 72, 73). According to defendant, Carter and Griffin would have verified that defendant never spoke with Solis about this case (M Tr, 72, 73). He also wanted Vern Silverston testify (M Tr, 73). Silverston, who had been in a holding cell with Jesse Solis, allegedly would have testified that Solis told him that he was "mak[ing] a deal on this guy by telling lies on him" (M Tr, 74). He also wanted Mary Hughes, Pat Johnson, Lynda Wynn, and defendant's brother, Richie (M Tr, 74-75). He also asked for Jimmy Horsley, who would have testified that he saw defendant walking down the street shortly after the shooting, without a mask (M Tr, 75). Further, he wanted Willie Campbell, who would have testified that defendant did not have a weapon at the time of the shooting (M Tr, 75). Further, defendant wanted Pat Johnson, who was with Campbell, who would have testified that defendant did not stop and talk with anyone, but left and went home (M Tr, 76). Defendant also wanted Mary Hughes, who had given a statement to police that she saw the shooter wearing a green shirt and burgundy pants, while defendant was wearing a black jacket and black pants (M Tr, 76-77). Defendant also wanted George Galvin, who would have testified that defendant did not get into an argument with anyone on the day of the murder, contradicting other testimony from trial (M Tr, 77). Finally, he wanted Cammy Blakely, who would have testified that defendant was in good spirits (M Tr, 78).

Defendant finally met with Krause-Phelan on March 20 and March 23 (M Tr, 78). At the March 20 meeting, Krause-Phelan advised that defendant take the plea offer (M Tr, 78). Defendant refused, saying that he did not commit the crime (M Tr, 78). They then discussed

the prosecution witnesses and what they would be saying (M Tr, 78). After discussing three or four witnesses, Krause-Phelan again advised that defendant take the plea offer; defendant again refused (M Tr, 78-79). Defendant felt that the discussion of the witnesses was only part of an attempt to get him to take the plea (M Tr, 79). Defendant told Krause-Phelan about a couple of his potential witnesses that he had seen in the jail (M Tr, 80). The meeting lasted between 45 minutes and one hour (M Tr, 80).

Three days later, defendant again met with Krause-Phelan (M Tr, 80). Again, she discussed the plea offer; defendant again refused to plead guilty (M Tr, 80). She left after about ten minutes, and defendant did not see her again until trial (M Tr, 80). He never got to speak with Krause-Phelan about what her strategy of the case would be (M Tr, 81). At trial, defendant wanted Krause-Phelan to impeach Sam Binion; he did not specify exactly what should have been asked (M Tr, 81-82). He said he wanted the same done for Dwight Mapp; again, he did not specify what he wanted asked (M Tr, 82). He objected to the law clerk being placed between him and Krause-Phelan, because he could not get to Krause-Phelan to tell her what questions he wanted asked (M Tr, 83).

Defendant then testified about the jury composition. He first told Krause-Phelan about what he saw as a problem with the jury during jury selection (M Tr, 83-84). Out of fifty venirepersons, there was one African-American, who asked to be excused (M Tr, 84). Krause-Phelan told defendant that even if they could get a venire with one or two African-Americans, "the prosecution would only have them kicked off" (M Tr, 84).

Defendant objected to not using the investigator, saying, "he could have found out a lot of information, okay, especially with the particular evidence that was concealed or suppressed, you know" (M Tr, 85). Defendant felt that there must be a missing statement to police by

Dwight Mapp, noting that Mapp was listed as a witness on February 16, but no statement appeared until February 27 (M Tr, 85). Also, the statement from Alfred Parnell was listed as No. 2, but there was no statement No. 1 (M Tr, 85-86). In addition, there was a statement from Mapp indicating that he had requested to see a lineup, but no evidence that he was given that lineup (M Tr, 86). In addition, three footprints from the crime scene were admitted into evidence, but there was nothing about the size of the prints or the make of the shoe (M Tr, 87). There were no statements from Brenda Jackson or Patricia Johnson, although they were listed as witnesses (M Tr, 87). Defendant felt that in order for them to be listed as witnesses, there had to be statements from them (M Tr, 87-88). He also saw a statement from Angela Cross, who testified on the last day of trial, just before Cross testified (M Tr, 88-89). Defendant also said that footprints that should have been left in the snow by the killer were not brought before the court (M Tr, 90).

Defendant never discussed with Krause-Phelan the witnesses that would testify, other than the three or four witnesses they discussed on March 20 (M Tr, 90-91). They also never discussed whether defendant would testify or, if so, what he would testify to (M Tr, 91). Krause-Phelan also gave him the impression that she would call witnesses on his behalf (M Tr, 91-92). On the fourth day of trial, she told him she would not be calling any of his witnesses (M Tr, 92).

Following the close of testimony and argument of counsel, the court found that defendant had not been denied the effective assistance of counsel, noting that while one could second-guess and say that Krause-Phelan could have pursued a different course, this got into trial strategy (M Tr, 100). The result of the trial would not have been any different had Krause-Phelan done anything that defendant was saying she should have done (M Tr, 100). The court

also noted that defendant was charged with first-degree murder, but convicted of second-degree murder, which was a benefit to defendant (M Tr, 100). Accordingly, the court denied defendant's motion for new trial (M Tr, 100).

Our Supreme Court has said the following about analyzing a claim of ineffective assistance of counsel:

> In [*Pickens, supra*], this Court explained that, when evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment of the United States Constitution, or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standard established in *Strickland* [*, supra*]:
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
>
> In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).
>
> Finally, it is important to note that defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel:
>
> A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. [] *Ginther*,[*supra*, 390 Mich 442-443]. [*People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999) (footnotes omitted).]

In the present case, defendant has raised three basic arguments on his claim of ineffective assistance. First, he claims that counsel failed to communicate with him before and during trial. The testimony of Krause-Phelan was that she visited with defendant on a number of occasions, and communicated with him throughout the course of the trial. That defendant might have preferred more communication is irrelevant. The question is whether the level of communication was such that it could be said that defendant was denied the counsel guaranteed him by the Sixth Amendment to the United States Constitution, not whether each individual defendant is fully satisfied with the level of communication. In the present case, Krause-Phelan's testimony adequately shows that she communicated with defendant and discussed strategy with him.

Defendant next argues that counsel was ineffective because she did not investigate the case. Krause-Phelan testified that she examined the prosecutor's and detective's records, and did not subpoena defendant's witnesses because either (1) they were on the prosecutor's list, (2) they could not be found, or (3) Krause-Phelan determined that their testimony would not be of assistance to defendant. While defendant contested this claim at trial, and made a claim as to what the testimony of some of these witnesses would be, this is the only evidence in the record regarding these claims. Credibility determinations in *Ginther* hearings are like credibility determinations in any other hearing; the determination is for the trier of fact, not for this Court. In this case, defendant went on at length about the content of each witness' testimony. However, the court was not required to believe that these witnesses could actually have been found, or that their testimony would agree in any way with defendant's version of their testimony. Further, Krause-Phelan's conclusions about whether witnesses would be of

assistance in the case are classic matters of trial strategy, which cannot be second-guessed. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Finally, defendant claims that counsel was ineffective for failing to raise a claim that defendant was denied a jury drawn from a fair cross-section of the population. The problem with the computer program used to select juries in Kent County was not uncovered until after trial, but before sentencing. While this Court has held that a fair cross-section claim be preserved by an objection prior to the jury being impaneled and sworn, see *McKinney, supra*, 258 Mich App 161-162, it does not necessarily follow that in a case in which there was a computer error, an attorney who makes no objection is necessarily ineffective. In the case of the computer error, we are aware of only one case out of hundreds in which an objection was made before the detection of the error. See *People v Ramon Lee Bryant*, unpublished Court Of Appeals opinion, issued March 16, 2004 (Docket No. 241442). If counsel was ineffective on this basis, so was every attorney in Kent County who handled a criminal jury trial during that period. A more reasonable rule is that, when a heretofore unknown problem arises in the selection of the jury, an attorney cannot be found ineffective for failing to object, even though an objection at the time of jury selection was necessary to preserve. More to the point, the record does not disclose the actual composition of the venire in this case. Admittedly, defendant testified about the composition of the jury. However, other than defendant's own self-serving claims, there is no evidence in the record that he was denied a jury drawn from a

fair cross-section of the population.[5] As noted in Issue I, all that has been shown is that counsel did not object, not that the outcome would likely have been different.

In short, defendant's claim is nothing more than the sort of flyspecking that is prohibited in a *Strickland* analysis. As Judge Buth correctly noted, Krause-Phelan handled the case professionally, there was no showing that a different outcome would have resulted, and Krause-Phelan succeeded in obtaining a second-degree murder conviction for defendant, who was charged with first-degree murder. No ineffectiveness has been shown.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING INTO EVIDENCE AN AUDIOTAPE OF A CONVERSATION BETWEEN DEFENDANT AND KRISTEN CROSS. THE TAPE WAS SUFFICIENTLY AUDIBLE THAT THE JURY COULD MAKE A DETERMINATION AS TO ITS CONTENTS. FURTHER, THE TRANSCRIPT WAS GIVEN TO THE JURY ONLY WHILE THE TAPE WAS PLAYED IN COURT. IT WAS NOT ADMITTED INTO EVIDENCE, AND NOT SENT WITH THE JURY FOR ITS DELIBERATIONS. ONLY THE TAPE WAS SENT IN WITH THE JURY.

Preservation of Error: Defendant objected to the tape and transcript before the tape was played (Tr V, 710-715). He has preserved his claim of error.

Standard of Review: This Court reviews rulings on admission of evidence for abuse of discretion. *People v Hack*, 219 Mich App 299, 308; 556 NW2d 187 (1996).

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[5] In fact, in *People v Bryant*, the one case in which this error was preserved, this Court did not reverse, but remanded for a hearing to determine the composition of the venire and to make a factual determination as to whether the defendant was denied a jury drawn from a fair cross-section of the population. Hearings on that case have begun, but have not been completed.

Argument: Defendant's claim, that he is entitled to a new trial because an audiotape of a conversation he had with Angela Cross was played, and a transcript provided, to the jury, is without merit.

Prior to the testimony of Angela Cross, defense counsel raised the issue of whether an audiotape of a conversation between Cross and defendant (Tr V, 710). The defense objected to admission of the tape on the grounds that there were large portions of the tape that were inaudible (Tr V, 710). In addition, defense counsel objected to a transcript of the tape that had been prepared by the investigating officer on the case, Detective Fannon, saying "It's Detective Fannon's interpretation of what is being said on the tape" (Tr V, 711). The prosecution said that the transcript was intended as nothing more than a trial aid, and would not be submitted as evidence (Tr V, 712). The court ruled that the tape would be admitted, saying

> I've heard it in chambers. It's not the best tape, but the jury's going to have to decide what it says. And I will allow, just for purposes of when the tape is played, Detective Fannon's transcript to be distributed to the jury and picked up after the tape is played.
>
> And, obviously, it won't be an exhibit, and it won't be available to the jury other than when they listen to the tape, and the jury can decide, ultimately, what is said. [Tr V, 715-716]

During Angela Cross' testimony, the tape was played for the jury (Tr V, 722).

An otherwise admissible tape "will not be excluded "[u]nless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy." *People v Karalla*, 35 Mich App 541, 545-546; 192 NW2d 676 (1971). The fact that a recording did not reproduce an entire conversation, or that some parts of the recording may be indistinct or inaudible, does not usually require the exclusion of the recording. *People v Karmey*, 86 Mich App 626, 632; 273 NW2d 503 (1978).

In the present case, defense counsel objected on the grounds that the tape was inaudible. The court agreed that the tape was not of the best quality, but ruled that the jury could hear it. It seems clear, from the context of the discussion, that the court had concluded that the tape was sufficiently audible that the jury would be able to determine what was being said. No abuse of discretion has been shown.

As for the transcript, it would appear that under *People v Lester*, 172 Mich App 769, 775-776; 432 NW2d 433 (1988), the court erred in allowing the jury to use the transcript in the absence of a finding that the transcript was an accurate representation of the contents of the tape. However, the omission in this case was only one of satisfying the foundational requirements, not that the transcript was unreliable. Further, the error in this case was harmless. Numerous eyewitnesses had identified defendant as the person who murdered the victim, David Franklin. Defendant's conversation with Angela Cross only added to the extensive evidence pointing directly to his guilt. Given the weight of the evidence in this case, any error in giving the jury the transcript was harmless. Defendant's argument must be rejected.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

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Dated: June 29, 2004

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